

MEMORANDUM

TO: State Sen. Jackie Winters

FROM: Chris Horner, Competitive Enterprise Institute

DATE: September 27, 2018

SUBJECT: Legality under ORS § 180.140 of Attorney General use of a privately funded prosecutor, for subject matters of donor concern

On August 28, 2018, the Competitive Enterprise Institute (CEI) published a report, "[Law Enforcement for Rent: How Special Interests Fund Climate Policy through State Attorneys General](#)". This detailed the placement, in six offices of attorney general (OAGs), of privately funded and hired prosecutors to "advanc[e] progressive clean energy, climate change, and environmental legal positions", which are of interest to the donor and organization employing the attorneys. The employer is New York University's Center for State and Environmental Impacts, funded by Michael Bloomberg.

One of these OAGs Oregon's, which on June 22, 2018 [announced](#) the placement of Steve Novick, an employee of NYU, as a "Special Assistant Attorney General" (SAAG). CEI's report detailed particular concern deriving from Oregon Revised Statutes § 180.140, also citing to numerous records obtained under Oregon's Public Records Act.

On September 22, 2018, the Washington Free Beacon [reported](#) a legal memorandum from Senior Deputy Legislative Counsel Marisa James to Senator Jackie Winters dated September 11, 2018 concluding, *inter alia*, because Mr. Novick "is not receiving a salary fixed by the Attorney General, and his salary is not paid as other state salaries are paid. This arrangement does not comply with [Oregon Revised Statute] 180.140 (4)."

On September 24, 2018, the Bend (OR) bulletin [reported](#), in an editorial "Prosecution for hire", "When we contacted [Attorney General Ellen] Rosenblum's office on Monday, we were sent a legal opinion arguing that the hiring is legal under Oregon law. That responds to an issue raised in a news article."

CEI has reviewed this legal opinion, also dated September 24, 2018, which is notable as being apparently DoJ's sole legal determination regarding the statutory legality of this arrangement¹. This determination takes the form of a letter to the supervisor of the author of Legislative Counsel's memo, Mr. Dexter Johnson. In this protest of Legislative

¹ On September 26, 2018, DoJ responded to a PRR request for all legal, ethics, authority and related determinations regarding an NYU, SAAG and/or Novick hire, and/or any correspondence using §180.140 or any correspondence to, from or copying an @nyu.edu address and using any form of "ethic", by providing only this one opinion to Legislative Counsel, stating, "In response to the attached public records request, please find enclosed DOJ's legal opinion regarding the NYU fellowship. Other potentially responsive records are exempt from disclosure under ORS 192.355(9) and ORS 192.355(1)."

Counsel's conclusion, the Oregon OAG sets forth DoJ's legal rationale for bringing into its office a privately funded prosecutor. That is that "ORS 180.140(4) does not apply to" Mr. Novick's placement but instead §180.140(5) does, and that ¶5 authorizes it.

As discussed in our report, we agree that Mr. Novick's placement is not authorized by 180.140(4). What is even more clear is that the "SAAG" provision, 180.140(5) does not apply to and does not authorize DoJ's arrangement with NYU. The arrangement's legal status is of course dictated by the reality of the arrangement, and Oregon's own practices implementing, e.g., §180.140(5).

Oregon in fact has a contract it uses to engage Special Assistant Attorneys General. DoJ provided CEI 14 of these extant agreements, purportedly representing all of these in effect as of May 2018 and which we can provide your Office. These contracts share two key characteristics: the assertion that the benefitting agency pay for the counsel, and specifying the particular cases or proceedings for which counsel is engaged.

Both of these provisions shared by SAAG contracts are grounded in the §180.140(5) requirement that the "cost of such special assistants or counsel shall be charged to the appropriate officer or agency", and authorizing only special counsel retained for "particular cases or proceedings".² DoJ's NYU contract reflects neither characteristic:

- 1) The entire premise of OAG's arrangement, as agreed among all parties and pled quite clearly in OAG's September 15, 2017 application, is that Oregon does not hire the attorney; instead, a private, activist donor does, and places him in OAG.
- 2) Mr. Novick was not placed in OAG for "particular cases or proceedings" as is required under ORS §180.140(5).³ Instead, by DoJ's own application, the Office of Attorney General requested a privately funded attorney to work on "**a broad range of substantive matters.**" Numerous DoJ correspondence also affirm this.

CEI has reviewed DoJ's legal opinion dated September 24, 2018, asserting its claim to statutory authority for Oregon DoJ's arrangement with NYU (neither party addresses the several facial constitutional problems the arrangement presents). For reasons detailed in our report, and above in assessing DoJ's *post facto* arguments, Mr. Novick is not a SAAG authorized by DoJ's claimed statutory authority, ORS §180.140(5).

² The implication of DoJ's position is that the legislature inadvertently conditioned such engagements for "particular cases or proceedings", or regardless that the language should be ignored. According to [ORS 174.010](#), "General rule for construction of statutes", "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted".

³ Were this position asserted by OAG in fact true the unprecedented arrangement would be even more facially questionable: an activist donor funding a prosecutor *for specific matters or cases* that concern him/it is so facially outrageous it requires the invocation of no analogies such as a National Rifle Association-funded prosecutor to work on Second Amendment issues, or a National Right to Life-funded prosecutor to investigate abortion providers.